

**COMMONWEALTH OF MASSACHUSETTS**

**APPELLATE TAX BOARD**

**PAUL JONES**

**v.**

**COMMISSIONER OF REVENUE**

Docket Nos. C329649  
C332051

Promulgated:  
November 6, 2018

These are appeals filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39 from the refusal of the Commissioner of Revenue ("Commissioner" or "appellee"), to abate personal income taxes assessed against Paul Jones ("Mr. Jones" or "appellant") for the tax years 2011, 2012, and 2013 ("tax years at issue").

Commissioner Scharaffa heard these appeals and was joined by Chairman Hammond and Commissioners Rose, Chmielinski, and Good in decisions for the appellant in tax years 2011 and 2012 and in a decision for the appellee in tax year 2013.

These findings of fact and report are made pursuant to a request by the appellant under G.L. c. 58A, § 13 and 831 CMR 1.32.

*Paul Jones, pro se, for the appellant.*

*Diane M. McCarron, Esq., Julie A. Flynn, Esq. and John DeLosa, Esq. for the appellee.*

## **FINDINGS OF FACT AND REPORT**

On the basis of the testimony and exhibits offered at the hearings of these appeals, the Appellate Tax Board ("Board") made the following findings of fact.

At all times relevant to these appeals, the appellant was a Massachusetts resident. The appellant filed two separate appeals with the Board, as described below.

### **1. Docket No. C329649 - tax years 2011 and 2012**

The appellant filed his Massachusetts Resident Income Tax Returns ("Forms 1") for tax years 2011 and 2012 on February 1, 2013. The Forms 1 reported Massachusetts gross income and expenses relating to several Schedule C businesses. The appellant's Form 1 for tax year 2011 reported Schedule C business expenses for three businesses totaling \$128,275, and his Form 1 for tax year 2012 reported Schedule C business expenses for two businesses totaling \$64,087.

After an audit of tax years 2011 and 2012, during which the auditor reviewed the receipts submitted by the appellant for purposes of substantiating his Schedule C expenses, the Commissioner disallowed all of the appellant's claimed Schedule C expenses. On June 8, 2015, the Commissioner issued a Notice of Assessment ("NOA") for tax years 2011 and 2012, assessing tax of \$6,799, plus

interest and penalties, for tax year 2011 and tax of \$3,365, plus interest and penalties, for tax year 2012. The appellant filed a timely abatement application, which was denied by the Commissioner on February 27, 2016, after a review by the Commissioner's Office of Appeals. The appellant seasonably filed a Petition Under Formal Procedure with the Board by first-class mail bearing a postmark date of April 27, 2016. On the basis of the above facts, the Board found and ruled that it had jurisdiction to hear the appeal for tax years 2011 and 2012.

At an initial hearing before the Board on June 12, 2017, the appellant produced receipts related to the purchase of cigars in an attempt to substantiate his claimed Schedule C business expenses. The appellant also testified that, prior to the assessment, he had requested an in-person hearing with the Commissioner's Office of Appeals to support his deductions but that he was denied a pre-assessment hearing. Based on the appellant's submission of evidence, the Board ordered that the Commissioner examine the submission, and that the hearing be continued to September 18, 2017.

At the resumption of the hearing, the appellant again testified that, before the assessment, he had requested an in-person hearing to support the deductions based on his

receipts but that Lori Paci, a field officer with the Commissioner's Office of Appeals, denied him an in-person hearing. She instead scheduled a telephonic hearing. When Ms. Paci testified next, she explained that she had scheduled a telephonic hearing for the appellant, assuming that this would be more convenient for him, rather than requiring him to drive from his home in Springfield for a hearing in Boston.

The Board next heard testimony from Robert Allard, a tax auditor within the Massachusetts Department of Revenue's Litigation Bureau. Mr. Allard explained that in his position, he reviews taxpayer audits after they have been completed, when the case is at the litigation stage. Mr. Allard testified that he reviewed the appellant's receipts for tax years 2011 and 2012 that had been provided at the initial hearing on June 12, 2017. He testified that for the majority of the appellant's claimed Schedule C business expenses, the appellant had failed to identify a business purpose for the expenses, failed to identify which expenses belonged to which business, and failed to reconcile the expenses with the amounts reported on his Forms 1.

However, upon review during the hearing recess, Mr. Allard testified that there were receipts sufficient to

support about 30 percent of the claimed expenses for tax years 2011 and 2012 and that he recommended 30 percent of the appellant's claimed Schedule C business expenses be allowed for tax years 2011 and 2012 and abatements be granted accordingly. The Commissioner agreed to this recommendation. The appellant cross-examined Mr. Allard but did not otherwise present any further evidence to substantiate the remaining expenses that the Commissioner did not accept.

On this basis, the Board found and ruled that Mr. Allard's testimony on this matter was credible and that abatements should be granted to the appellant based on the Schedule C business expenses that the Commissioner agreed should be allowed for tax years 2011 and 2012. Accordingly, the Board issued a decision for the appellant in Docket No. C329649 and granted an abatement of \$2,039.70 for tax year 2011 and \$1,009.50 for tax year 2012, plus statutory additions.

## **2. Docket No. C332051 - tax year 2013**

The appellant did not file a Form 1 for tax year 2013. The appellant maintained that he submitted to the Commissioner a copy of his federal income tax return, Form 1040, for tax year 2013, which reflected \$0 taxable income. On March 29, 2016, the Commissioner issued to the appellant

an NOA assessing tax of \$8,143, plus interest and penalties. On January 23, 2017, the appellant filed with the Commissioner a Form DR-1: Office of Appeals Form ("settlement request form"), along with other documentary submissions. The appellant did not include an abatement application with his submissions. By letter dated April 14, 2017, the Office of Appeals informed the appellant that he could not have a second hearing because he had not submitted any new information relative to his tax situation. The letter included guidelines on how to pursue settlement of the matter, including instructing the appellant to submit an abatement application. The letter also included an abatement application as an attachment. By letter dated June 8, 2017, the Office of Appeals rejected the appellant's settlement request form.

At the initial hearing on June 12, 2017, the Commissioner filed a Motion to Dismiss for Docket No. C322051 based on the fact that the appellant had failed to file a Form 1, which the Commissioner contended was a prerequisite to the Board's jurisdiction over his appeal pursuant to G.L. c. 62C, § 38.

The appellant countered that he did not have a requirement to file a Form 1 because he did not have income in excess of the Massachusetts filing threshold of \$8,000.

The appellant admitted that he did receive lawsuit-settlement income during tax year 2013. He submitted to the Board copies of federal 1099 forms showing income of \$74,250, representing lawsuit recoveries from eight different lawsuits.

The appellant explained the circumstances leading to the lawsuits. In the course of operating his cigar business, the appellant obtained multiple telephone "tracking numbers," which were designed to receive inbound telephone calls. The appellant used these tracking numbers while conducting his business to give the impression that his business was local to the customer. The appellant, however, began receiving numerous calls from bill collectors who were pursuing the previous holders of the telephone tracking numbers. The appellant filed multiple lawsuits against debt collection agencies claiming tort damages under various federal and state laws, including the federal Telephone Consumer Practices Act. The appellant admitted that the lawsuit recoveries were for tort damages, specifically intentional infliction of emotional distress, but he asserted that his emotional-distress injury included various physical components, including headaches, insomnia, and stomach disorders. However, the appellant did not submit any evidence to indicate that his lawsuit recoveries

specifically compensated for physical injuries, for example, medical care and treatment.

Based on its findings, the Board found that the appellant failed to meet his burden of proving that the lawsuit recoveries were compensation for physical injuries or physical sickness. As will be further explained in the Opinion, only recoveries specifically designed to compensate for physical injuries or physical sickness are excludable from gross income. The appellant's payments were thus includible in his Massachusetts income.

Furthermore, the \$74,250 in lawsuit recoveries that the appellant admitted to receiving in tax year 2013 far exceeded the \$8,000 threshold requirement for the filing of a Form 1. Therefore, the appellant was required, but failed, to file a Massachusetts Form 1 for tax year 2013. As will be explained in the Opinion, the filing of a tax return is a statutory prerequisite to the right to seek abatement.

Moreover, the Board found that the appellant's settlement request form did not qualify as an abatement application, because a settlement request form is not a form approved by the Commissioner for purposes of requesting abatement.



Because the appellant failed to file a return and failed to apply for an abatement for tax year 2013, the Board found and ruled that it did not have jurisdiction over the appeal for tax year 2013.

Accordingly, the Board issued a decision for the appellee in Docket No. C332051 for tax year 2013.

### OPINION

#### **1. Docket No. C329649 – tax years 2011 and 2012**

"Deductions are to a large extent a matter of legislative grace." *Drapkin v. Commissioner of Revenue*, 420 Mass. 333, 343 (1995). Additionally, a taxpayer bears the burden of demonstrating his or her entitlement to claim deductions against Massachusetts income. See *Horvitz v. Commissioner of Revenue*, 51 Mass. App. Ct. 386, 391-92 (2001); see also *Indopco, Inc. v. Commissioner*, 503 U.S. 79, 84 (1992) (affirming that "the burden of clearly showing the right to the claimed deduction is on the taxpayer") (additional citation omitted). "To sustain this burden, the taxpayer must substantiate claimed deductions." *Leo Lake, III v. Commissioner of Revenue*, Mass. ATB Findings of Fact and Reports 2017-198, 210.

The Commissioner's regulation at 830 CMR 62C.25.1(9) requires that taxpayers claiming Schedule C deductions must

preserve and maintain "permanent books of accounts or records" that "must be in sufficient detail and clarity to delineate and support each line item deducted on such Schedule C." In the appeal for Docket No. C329649, Mr. Allard testified that, for the majority of the appellant's claimed Schedule C expenses, the appellant failed to identify a business purpose for the expenses, failed to identify which expenses belonged to which business, and failed to reconcile the expenses with the amounts reported on his Forms 1. The Board found Mr. Allard's testimony on this matter to be credible, and the appellant did not present additional evidence at the rehearing to substantiate his expenses. Therefore, the Board found and ruled that the majority of the appellant's records were not "in sufficient detail and clarity to delineate and support each line item deducted" on his Schedule C as required by 830 CMR 62C.25.1(9).

However, upon review, the Commissioner agreed that some of the appellant's receipts supported his claimed Schedule C deductions. The Commissioner agreed with Mr. Allard's recommended adjustments, which allowed 30 percent of the appellant's claimed Schedule C expenses for both tax years 2011 and 2012. Based on the Commissioner's agreement, the Board found and ruled that 30 percent of the

appellant's claimed Schedule C expenses were sufficiently supported to allow for their deduction.

Accordingly, the Board issued a decision for the appellant granting abatements of \$2,039.70 for tax year 2011 and \$1,009.50 for tax year 2012, plus statutory additions.

## **2. Docket No. C332051 - tax year 2013**

Pursuant to G.L. c. 62, § 2, residents of Massachusetts are taxed on all of their income, regardless of the source, with certain exceptions not here relevant. Individuals seeking an abatement of tax may apply to the Commissioner for abatement under the provisions of G.L. c. 62C, § 37. However, "[n]o tax assessed on any person liable to taxation shall be abated unless the person assessed shall have filed, at or before the time of bringing his application for abatement, a return as required by this chapter for the period to which his application relates." G.L. c. 62C, § 38. Consistent with this express prerequisite to abatement, the Supreme Judicial Court has held that a taxpayer's failure to file a tax return precludes the taxpayer's right to abatement. See **Commissioner of Revenue v. Pat's Super Market, Inc.**, 387 Mass. 309, 310 (1982); **Assessors of Boston v. Suffolk**

**Law School**, 295 Mass. 489, 492 (1936) (citing **International Paper Co. v. Commonwealth**, 232 Mass. 7, 10 (1919)).

The appellant did not file a Form 1 for tax year 2013. The issue is whether he was "required" to do so. During tax year 2013, the appellant's sources of income were solely from lawsuit settlements. The definition of "gross income" in G.L. c. 62, § 2(a) incorporates the federal definition of that same term. The United States Internal Revenue Code ("Code") at § 61(a)(1) defines "gross income" as "**all** income from **whatever source derived.**" (emphasis added). The Supreme Court has held that Code § 61 was intended by Congress to exert "the full measure of its taxing power" over all income from whatever source derived. **Commissioner of Internal Revenue v. Glenshaw Glass Co.**, 348 U.S. 426, 429 (1955) (citations omitted).

The Code does specify certain exemptions from gross income. Code § 104(a)(2) excludes from income "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." This provision further specifies that "emotional distress shall not be treated as a physical injury or physical sickness." Code § 104(a)(6). See **Maciujec v. Commissioner of Internal Revenue**, T.C.

Summary Opinion 2017-49 (July 12, 2017). The Code, however, allows deductions for "damages not in excess of the amount paid for medical care . . . attributable to emotional distress." Code § 104(a)(6).

A taxpayer bears the burden of proving facts sufficient to sustain a claim of abatement. See **M & T Charters, Inc. v. Commissioner of Revenue**, 404 Mass. 137, 140 (1989); **Stone v. State Tax Commission**, 363 Mass. 64, 65-66 (1973); **Staples v. Commissioner of Corps. and Taxation**, 305 Mass. 20, 26 (1940). While the appellant made bare assertions that he had suffered physical injuries from his emotional distress, he did not submit evidence establishing that the lawsuit settlements were awarded as compensation for specific physical injuries or as repayment for medical care. The Board thus found and ruled that the appellant did not meet his burden of proving that the settlement amounts he received were designed to compensate him for any physical injury. Therefore, the lawsuit-settlement amounts were required to be included as income on the appellant's Form 1 for tax year 2013.

The minimum threshold amount for the required filing of a Form 1 is \$8,000 for an individual. G.L. c. 62C, § 6. Because the appellant had at least \$74,250 in income in tax year 2013, which far exceeded the \$8,000 filing threshold,

the appellant was required to file a Form 1 for tax year 2013. The appellant's entitlement to abatement is predicated upon the filing of a return pursuant to G.L. c. 62C, § 38. The appellant did not file a Form 1 for tax year 2013. Therefore, the Board found and ruled that the appellant did not meet the necessary threshold requirement for an abatement, as the Board did not have jurisdiction to grant an abatement. See **Pat's Super Market**, 387 Mass. at 310 (ruling that the Board lacks jurisdiction to abate a tax where a taxpayer is required to, but does not, file a return).

Additionally, the appellant did not file an abatement application, despite being instructed by the Office of Appeals to do so; in fact, the Office of Appeals sent him a form to use for this purpose. The Board found that the appellant's settlement request form was not an abatement application, because a settlement request form is not "a form approved by the commissioner" for the purpose of seeking abatement. G.L. c. 62C, § 37.

Abatement is a remedy created by statute; therefore, the Board has only that jurisdiction conferred on it by statute. **Pat's Super Market**, 387 Mass. at 311; **Theodore and Joan Levitt**, Mass. ATB Findings of Fact and Reports 1997-38, 45 (citing **Commissioner of Revenue v. A.W.**

**Chesterton**, 406 Mass. 466, 468 (1990) (“[T]he Board has no jurisdiction to order an abatement unless it finds that the proceedings were . . . prosecuted in the manner specifically prescribed by the governing statute.”)). Pursuant to G. L. c. 62C, § 39, the filing of an abatement application is a jurisdictional prerequisite to the Board’s authority to grant an abatement: “Any person aggrieved by the refusal of the commissioner to abate or to refund a tax, in whole or in part, whether such refusal results from the denial of an abatement application made under section 36 or 37, may appeal therefrom.” See also **Boston Safe Deposit & Trust Co., Executor, Estate of Peter T. Hartmann v. Commissioner of Revenue**, Mass. ATB Findings of Fact and Reports 1995-238, 242 (ruling that the Board has no jurisdiction over an appeal where a taxpayer failed to file an abatement application with the Commissioner); **Dana Lease Finance Corp. v. Commissioner of Revenue**, 53 Mass. App. Ct. 840, 843 (2002); **Tilcon Massachusetts, Inc. v. Commissioner of Revenue**, 30 Mass. App. Ct. 264, 264-67 (1991). The appellant here failed to file an abatement application. The Board, therefore, found and ruled that it had no jurisdiction to hear the appeal for tax year 2013 based on this additional jurisdictional ground.

## **Conclusion**

In Docket No. C329649, based on the Commissioner's agreement, the Board found and ruled that 30 percent of the appellant's claimed Schedule C expenses were sufficiently supported to allow for their deduction. Accordingly, the Board issued a decision for the appellant granting abatements of tax of \$2,039.70 for tax year 2011 and \$1,009.50 for tax year 2012, plus statutory additions.

In Docket No. C332051, the Board found and ruled that it did not have jurisdiction on the independent grounds that the appellant neither filed a tax return nor an abatement application for tax year 2013. Accordingly, the Board issued a decision for the appellee in Docket No. C332051.

## **THE APPELLATE TAX BOARD**

**By:**

Thomas W. Hammond, Jr., Chairman

**A true copy,**

**Attest:** \_\_\_\_\_  
**Clerk of the Board**